SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **IAS MOTION 5**

Justice

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NICHOLAS NATOLI,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

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INDEX NO. 154612/2012

MOTION DATE 12/11/2020

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this petition for attorneys' fees (sequence 010): 197, 198, 200-267

Plaintiff Nicholas Natoli commenced this labor law action to recover for injuries sustained on July 6, 2011 when, while attempting to move a wooden pallet, Plaintiff's coworker apparently lost his grip and the pallet fell on Plaintiff. Plaintiff ultimately obtained a post-trial settlement of $6,405,000, including legal fees of $2,110.343.73. Petitioner Asta & Associates, Plaintiff's counsel for most of this action and at the time he obtained the settlement, now moves by order to show cause, for the Court to determine the value of the lien held by Respondent Talisman & Delorenz, P.C., Plaintiff's prior counsel, which seeks a portion of the fees.[1] After a virtual hearing held via Microsoft Teams, and post-hearing briefing, the Court agrees with Petitioner that despite the fact that "nothing was easy" about this action, Petitioner's experience and determination were the primary factor in Plaintiff's outstanding outcome, but nevertheless that Respondent is entitled to the value of its work. Accordingly, Respondent is entitled to 6.5%, and Petitioner to 93.5%.

FINDINGS OF FACT[2]

Michael Asta, Petitioner's namesake and principal, testified for Petitioner. Asta has been practicing plaintiffs'-side personal injury law for 31 years; during that time, he has been an active member of the New York State Trial Lawyers Association, including time spent on the

[1] The exact percentage sought by Respondent is unclear, though it appears to be between 25 and 33% (*Tr* 81:24-83:3).

[2] These are the Court's relevant findings of fact after the hearing, having weighed the credible testimony and documentary evidence. Any specific disputes are noted.

The prior facts and procedural history are more fully set forth in numerous prior decisions, including a post-trial decision (*see NYSCEF 97* [seq 4, Edmead, J.], *modified in part*, 148 AD3d 489, 489 [1st Dept 2017]; *NYSCEF 190* [seq 9, Sokoloff, J.]).

auto, premises, and law committees, and on the torts committee of the New York City Bar (*Tr* 2:11-21).[3] Asta was also an adjunct professor at New York University for 10 years (*Tr* 2:19-21).

Reza Rezvani, Petitioner's trial counsel, also testified for Petitioner. Rezvani has been practicing personal injury law since 2002, including 60 jury trials (*Tr* 12:4-11). Rezvani, a partner at Faruqi & Faruqi, has been adjunct professor at both Fordham Law School and Hofstra Law School for 15 years, teaching fundamental lawyering skills and trial advocacy (*id.*).

Robert Abruzzino testified for Respondent. Abruzzino, an associate, has been practicing law since 1999 (*Tr* 55:1-4). Steven De Lorenz, Respondent's senior partner, also testified for Respondent (*Tr* 76, *et seq.*). De Lorenz has been practicing law for 30 years, 27 of those years with Respondent (*Tr* 76:12-16). De Lorenz is also a member of the New York State Trial Lawyers Association, and has served on the board of a top 50 law school (*Tr* 77:17-22).

Petitioner took Plaintiff's case in 2011 after he had already been rejected by two other prominent New York City labor law firms because of its difficulty—specifically, that the case was not a standard Labor Law § 240 height differential case because the pallet which fell on Plaintiff was at the same level as Plaintiff (*Tr* 2:25-3:6, 3:18-4:7). It was a case against New York City and the New York City School Construction Authority (*Tr* 3:7-9).

Upon retention, Petitioner immediately performed site inspections, took photos, prepared and served a notice of claim, and gathered medical records (*Tr* 3:7-17). Petitioner accompanied Plaintiff to his GML § 50-h hearing, commenced this action, proceeded with discovery including obtaining thousands of pages of employment, union, and medical records, attended numerous conferences and depositions, and handled numerous motions (*Tr* 4:8-12, 5:12-6:4, 61:13-17). Petitioner finished discovery, filed a note of issue, and ultimately prevailed on a motion for summary judgment before Justice Edmead in 2016, at that point about five years after Plaintiff had retained Petitioner (*Tr* 6:5-23). Defendants successfully appealed that decision; Respondents retained and financed appellate counsel.[4]

Throughout the suit, Plaintiff called Petitioner at least once a week for case updates (*Tr* 4:18-5:11). Plaintiff, "growing frustrated with the length of the case," switched firms to Respondent in June 2016 (*Tr* 6:24-7:8). In August 2017, after mediation failed to yield a settlement, Plaintiff returned to Petitioner (*Tr* 7:7-12). Petitioner, including Rezvani, engaged in extensive trial preparations—"every day for at least three to four months"—and all that entails: record production, testimony preparation, trial memoranda and motions, and more (*Tr* 7:13-8:4, 24:17-26:8). The witness preparation took on added difficulty because of Plaintiff's "gruff" demeanor (*Tr* 8:13-16).

The trial was three weeks long, "20-hour days, seven days a week," including numerous unusual measures, such as an after-hours virtual deposition of one of the treating doctors and a

[3] "Tr" refers to the hearing transcript (*NYSCEF 264*).
[4] The parties disputed the wisdom and significance of Respondent having declined to cross-appeal on Labor Law 241(6)/industrial code issues. Given the positive result for Plaintiff and the uncertainty surrounding any appeal, the Court does not second-guess Respondent's decision not to cross-appeal.

non-party deposition ending at 10:00 p.m. (*Tr* 12:16-13:1).[5] Defendants were represented by Posey O'Connor, a well-respected defense firm, and a distinguished adversary, Michael Cervino (*Tr* 13:2-6). The substance of the case was challenging, including a "confusing" Labor Law § 240 charge and significant causation theories relating to prior accidents, including treatment to one of the same body parts at issue in this action by a doctor ultimately convicted of fraudulent billing (*Tr* 14-15, 26-34). Also challenging was Plaintiff's demeanor; in the trial judge's words, Plaintiff "rubs certain people the wrong way…there were many people in the courtroom who didn't like him" (*Tr* 14:1-23, 55:5-9, 66:15-21). Plaintiff sometimes displayed a temper, including waving a cane and lobbing profanity at defense counsel and, later, the mediator (*Tr* 14:24-15:19, 66:17-21, 79:2-6).

Plaintiff's theory of the case was that the pallet was 200-250 pounds, thus requiring a safety device; Defendants countered that the pallet was 100 to 125 pounds and did not require any safety device (*Tr* 15:18-16:1). Petitioner had to counter the report of a non-party witness, Plaintiff's supervisor, who had created a report estimating the pallet's weight at 100 pounds, and two corroborating witnesses with extensive experience; Petitioner was ultimately able to exclude the supervisor's testimony as lacking any basis, and challenge the credibility of the other two (*Tr* 16:2-22, 20:1-22:6).[6] For summary judgment and trial, Petitioner secured the testimony of an engineer, who contended the pallet weighed over 200 pounds; Respondent did not secure any weight calculation (*Tr* 17:1-18:25). As Petitioner argues, the Appellate Division recognized the pallet's weight as a central issue of fact (*Tr* 17:13-19; *Natoli v City of NY*, 148 AD3d 489, 489 [1st Dept 2017]).

Petitioner also worked extensively to address issues relating to damages. For example, among other things, Petitioner obtained new economic evaluations to supplement those obtained by Respondent, which were lower because they relied primarily upon hours and wages from 2007-2009, during the Great Recession, and not the years prior (*Tr* 44-49).

A split jury awarded Plaintiff $4 million comprising past and future lost wages and past and future medicals, though nothing for past and future pain and suffering (*Tr* 8:19-24). Defendants' insurance company, which had an observer in court every day of trial, procured affidavits from two jurors attesting to their confusion regarding the charge which were used in post-trial motion practice (*Tr* 9:5-14). After multiple settlement conferences, Justice Sokoloff, the trial judge, ultimately granted Plaintiff's cross-motion for additur, supplementing the verdict with $500,000 each for past and future pain and suffering (*Tr* 9:15-21, 52-53).

Defendants appealed Justice Sokoloff's denial of the motion to set aside the verdict, and Plaintiff cross-appealed to set aside the verdict to the extent of directing a new trial on the issues of past and future pain and suffering unless defendants stipulated to an increase; the appeal was argued in February 2020, and the First Department ultimately held in Plaintiff's favor (*Tr* 9:22-

[5] Jury selection alone was six days long, at one point requiring a curative instruction regarding statements about Plaintiff's comparative fault (*Tr* 22-23).

[6] Among other things, Petitioner litigated the admissibility of the supervisor's testimony, because Defendants hadn't identified him as a witness (*Tr* 19:2-11). Justice Sokoloff ultimately permitted his testimony on the condition that he be deposed; the supervisor's deposition was one of the late-night depositions held while the trial was ongoing (*Tr* 19:16-21).

10:11, 52-54; *Natoli v City of NY,* 180 AD3d 477, 478 [1st Dept 2020]). Petitioner supplemented the Bill of Particulars based on Plaintiff's additional cervical infusion while the appeal was pending (*Tr* 10:12-22). Defendants moved to reargue the appeal, and for permission to appeal to the Court of Appeals. Petitioner hired an economist and restarted discussions with Defendants' insurance company, which assigned a new claims adjuster. After multiple conferences, the case settled in March 2020 for $6,405,000, including legal fees of $2,110.343.73 (*Tr* 10:23-11:7). Petitioner performed additional work after that, including resolution of a substantial worker's compensation lien (*Tr* 11:4-7).

Petitioner acknowledges that that Respondent had the case for 14 months between June 2016 and August 2017, during which time they conducted a supplemental EBT, obtained a supplemental medical report, and prepared for and attended an unsuccessful mediation (*Tr* 11:8-20). Petitioner challenges Respondent's failure to appeal the industrial code aspect of the action (*Tr* 51:7-22).

Respondent challenges what Abruzzino characterizes as Petitioner's attempt to "minimize" Respondent's impact, which Respondent argues was a "critical link[]...that ultimately led to the verdict in this case, and worth at least 25% of the fees (*Tr* 55:10-16, 90:3-15). Respondent began its 14-month representation of Plaintiff in June 2016, with a two-hour intake (*Tr* 57:20-1, 58:8-18). Respondent took significant time to review "thousands of pages" of records received from Petitioner (*Tr* 61:13-20). As a result of an additional surgery in November 2016, Respondent requested additional medical records and prepared two additional bills of particulars (*Tr* 61:21-62:11, 84:8-85:2). Respondent also obtained numerous expert medical and economic reports (*Tr* 62:12-22).[7] Respondent opposed two discovery motions and made numerous appearances, including settlement conferences and the unsuccessful mediation (*Tr* 65:18- 66:14).[8] Respondent also consulted with appellate counsel regarding the appeal of Justice Edmead's summary judgment decision (*Tr* 90:22-91:25). During Respondent's representation, Plaintiff regularly called Respondent, sometimes multiple times per week, for at least 30 minutes at a time (*Tr* 58:2-7).

Abruzzino initially testified, and repeated throughout the early phases of his testimony, an assertion that Respondent was able to obtain, and rejected, a "seven figure" offer at the

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[7] The Court accepts Respondent's testimony and documentary evidence demonstrating that Respondent's selection of Dr. Dwyer, Plaintiff's economic expert, played a role in the favorable verdict (*see Tr* 70, *et seq.*). However, as the Court intimated and as Respondent acknowledged during the hearing, Respondent played no role in preparing Dwyer for trial.

[8] Petitioner challenged Respondent's assertion regarding the number of appearances alleged by Respondent (13), arguing that 5 were to Room 130, 60 Centre St., the motion submission part which serves a crucial function in marking motions submitted and forwarding them to the assigned judge, but a part in which attorneys do not normally appear, particularly in e-filed cases (*see generally http://ww2.nycourts.gov/courts/1jd/supctmanh/motions_on_notice.shtml*). Abruzzino replied that he has no specific recollection of those dates, but that it is generally his practice to appear in person, "especially in a substantial case," to "make sure that everything is submitted in satisfactory form" (*Tr* 105:2-16).

While this is certainly out of the ordinary, the Court finds no reason to doubt this testimony, particularly because of what it implies. That is, to the extent that Respondent does not allege that anything went wrong in the motion submission part at any of those appearances, more than 1/3 of Petitioner's in-court appearances did not have any impact upon this action's outcome.

August 15, 2017 mediation (*Tr* 56:14-57, 75:17-20). De Lorenz, who was at the mediation, repeated this, testifying that Respondent obtained a "million five or so" offer (*Tr* 78:16-22). In a turn of events speaking to Petitioner's diligence and professionalism, after a short break in testimony, Petitioner was able to secure the testimony of William Kirrane, the attorney appearing for Defendants at the mediation, disputing Respondent's assertion about the seven-figure mediation offer, in addition to Plaintiff's prior affidavit denying having received any mediation offer (*Tr* 92, *et seq.*; *NYSCEF 250*).[9] Kirrane testified credibly that Defendants offered $425,000, and that "there was never a seven figure offer" to Plaintiff (*Tr* 95:3-25). Kirrane explicitly testified that he "absolutely...did not have" the authority to tell the mediator that Defendants could pay over a million dollars; rather, his adjuster had authority for $600,000 (*Tr* 100:3-24).[10]

DISCUSSION

Petitioner proposes that Respondent receive a percentage based on the settlement offer that Respondent obtained: 1/3 to 1/2 of $425,000 after deducting expenses accrued by that time, or $45,371.01 to $68,056.52 (*NYSCEF 263* p 22). Respondent seeks 25% (*NYSCEF 265* ¶ 14).

Judiciary Law § 475 provides that

> From the commencement of an action, ... the attorney who appears for a party has a lien upon a client's cause of action, claim or counterclaim. which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hand they may come; and the lien cannot be affected by any settlement between the parties before or after judgment. final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

The appropriate fee is determined at the conclusion of litigation, measured as a percentage of the recovery (*Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655, 659 [1993]). Even in the absence of time records, the value of services can be determined based upon the testimony of the handling attorney and documents in the file which reflect the work performed (*Kokkalis v Arnstein*, 173 AD3d 723, 724 [2d Dept 2019]).

In considering the appropriate fee apportionment, this Court's decision is not based on the abilities of counsel, which are all impeccable. Rather, courts generally consider "the amount of time spent by the attorneys on the case, the nature of the work performed, and the relative contributions of counsel" (*Brown v Governele*, 29 AD3d 617, 618 [2d Dept 2006] [reducing an award of 40% of the net contingency fee to 5% where outgoing counsel commenced the action but incoming counsel "filed an amended summons and complaint on behalf of the plaintiff,

[9] In the absence of any opportunity to cross-examine Plaintiff regarding this assertion, and De Lorenz's representation as an officer of the Court that he always communicates offers to clients (Tr 114:8-9), the Court affords Plaintiff's affidavit no weight.

[10] Respondent's rebuttal to this point—essentially, that this figure was informal speculation by the mediator—was not persuasive (*Tr* 114-115; *NYSCEF 263* p 21).

conducted discovery, successfully opposed a motion for summary judgment on the issue of the liability of [one of the defendants], and represented the plaintiff at mediation"]; *see also Poulas v James Lenox House, Inc.*, 11 AD3d 332, 332-333 [1st Dept 2004] [affirming an award of 1/30th (3.3%) of total contingency fees for outgoing counsel where "outgoing firm merely filed and served a three-page summons and complaint in the action and obtained some medical records during the 11 months it served as plaintiff's attorney," and incoming firm "responded to defendants' discovery requests, conducted approximately 10 depositions, retained experts on liability and damages, conducted voir dire, engaged in settlement negotiations and secured a highly favorable settlement for plaintiff, whose injuries, although serious, were difficult to establish clinically"]).

The Court finds this action falls somewhere on the spectrum between *Buchta v Union-Endicott Cent. Sch. Dist.*, (296 AD2d 688, 688 [3d Dept 2002]), cited by Respondent, and *Shabazz v City of New York*, (94 AD3d 569 [1st Dept 2012]), cited by Petitioner. In *Buchta,* the first firm received 10% of fees where it performed an initial investigation, complied with requisite notice requirements, and procured a settlement proposal of $350,000 (296 AD2d 688). The second firm received 25% for commencing the action, completing discovery, filing a note of issue, preparing and filing a summons and complaint, completing bills of particulars, making numerous discovery demands, conducting multiple depositions, and retaining the services of an economic expert, and obtaining a high-low arbitration offer of $750,000 and $150,000 (*id.* at 688-89). The third firm, which prepared the case for trial for 2.5 years and ultimately obtained a $2,000,000 settlement before trial, received 65%.

Conversely, in *Shabazz*, the First Department reduced the trial court's award from 15% to 5% where the outgoing attorneys served the notices of claim on the municipal defendants, obtained plaintiff's medical records, represented him in a municipal 50-h hearing, and commenced the action by filing and serving a summons and complaint, but the incoming attorneys "conducted all of the discovery and depositions in the case, retained all of the experts, selected a jury, represented plaintiff throughout the 10-day jury trial, obtained a $4 million verdict in plaintiff's favor, made and opposed post-verdict motions, and ultimately negotiated a $2.2 million settlement on plaintiff's behalf in an action that was complicated by plaintiff's credibility issues and the lack of witnesses" (94 AD3d 569).

Here, the credible evidence establishes that Respondent made several appearances, retained an economic expert, engaged in motion practice, reviewed existing records, obtained updated records, prepared multiple updated bills of particulars, and prepared for and attended a mediation which procured a substantial settlement offer. Moreover, Respondent spent significant time over the course of 14 months communicating with a client described universally as difficult.[11] Given, however, that Petitioner's efforts represented the lion's share of the work performed—in terms of both volume, time, difficulty, and consequentiality—Respondent is nevertheless entitled to a relatively minor share of the proceeds.

Though Respondent cites actions in which a firm which did less work but received a higher percentage, those actions are distinguishable for various reasons, including that the value

[11] This should not be read as a criticism of Plaintiff; even under the best circumstances, litigation can be a time-consuming, frustrating, and costly process.

of the action was substantially lower and that the cases involved actions in which outgoing counsel performed the initial investigation and work, a crucial part of any action; phrased another way, where the case value is lower, less is required to earn a larger share (*see Kokkalis,* 173 AD3d 723 [in action settled for $70,000, fees reduced from $10,000 to $5,000, or 43% to 21.5%]; *see also Kim & Cha, LLP v Lo*, 2012 NY Slip Op 32567[U], *5 [Sup Ct, Queens County 2012] [awarding 20% of $10,000 gross fees where counsel "performed an investigation of the motor vehicle accident, filed a claim for no fault benefits, attained medical reports and records from medical providers, prepared and delivered to the liability insurance carrier a pre-suit special settlement packet, and attempted to settle the instant matter on several occasions with the defendant's law firm and the defendant's liability carrier"]).

Thus, while Respondent's contribution was, as it asserts, an important link in the chain which ultimately resulted in a favorable outcome, it was not the first, last, or strongest link. This is less a critique of Respondent's work than a compliment to Petitioner's exceptional efforts. The Court therefore finds that 6.5% of the net contingent fee is an appropriate apportionment to Respondent.

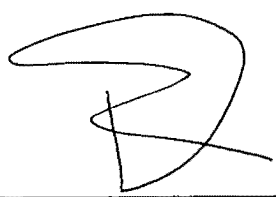
CONCLUSION/ORDER

For the reasons above, upon Petition of Asta & Associates, P.C., it is

ADJUDGED and **ORDERED** that Petitioner shall be entitled to 93.5% of the net attorneys' fees in this action of $2,110,343.73, and therefore that Petitioner shall pay to Talisman & Delorenz, P.C. the total sum of $137,172.34, in full satisfaction of any and all liens against the proceeds of the settlement of this action; and it is further

ORDERED that Petitioner shall, within 30 days, e-file and serve a copy of this order with notice of entry upon Respondent.

This constitutes the decision and order of the Court.



12/23/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE